

IN THE MISSOURI SUPREME COURT  
EN BANC

STATE EX REL. BOBBY JOE MAYES,	)	
	)	
APPELLANT,	)	
	)	
VS.	)	No. SC85657
	)	
THE HON. JOHN D. WIGGINS,	)	
	)	
RESPONDENT.	)	

---

ON PRELIMINARY WRIT OF PROHIBITION  
FROM THE SUPREME COURT OF MISSOURI, EN BANC  
TO THE HON. JOHN D. WIGGINS,  
CIRCUIT JUDGE OF PULASKI COUNTY

---

BRIEF OF RELATOR

---

Deborah B. Wafer MBE # 29351  
Office of the Public Defender  
Capital Litigation Division  
1000 St. Louis Union Station  
Grand Central Building; Suite 300  
St. Louis, Missouri 63103  
(314) 340-7662 – Telephone  
(314) 340-7666 – Facsimile  
Attorney for Relator

## TABLE OF CONTENTS

Table of Authorities .....	2-3
Jurisdictional Statement.....	4
Statement of Facts .....	5-11
Point Relied On.....	12-13
Argument.....	14-23
Judge Wiggins exceeded his authority in ordering a penalty phase retrial in relator Mayes' underlying criminal case	
Conclusion.....	24
Certificate of Compliance and Service .....	25
Appendix to Relator's Brief:	
Respondent's Order dated August 1, 2003 .....	A1
Section 565.030, RSMo. 2000 .....	A2-A3
Section 565.040, RSMo. 2000 .....	A4-A7
Section 565.016, RSMo. 1978.....	A8
Section 559.011, RSMo. (Supp 1975).....	A9
<i>State v. Duren</i> , 547 S.W.2d 476 (Mo.banc 1977).....	A10-A17

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bullington v. Missouri</i> , 451 U.S. 430 (1981) .....	4
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002) .....	5, 6, 7, 16, 20
<i>State ex rel. Baker v. Kendrick</i> , .....	passim
136 S.W.3d 491 (Mo.banc 2004)	
<i>State ex rel. Police Retirement System of St. Louis v. Mummert</i> , .....	18
875 S.W.2d 553 (Mo. banc 1994)	
<i>State ex rel. Proctor by Bryson</i> , 100 S.W.3d 775 (Mo.banc 2003) .....	17
<i>State ex rel. Westfall v. Mason</i> , 594 S.W.2d 908 (Mo.banc 1980) .....	4
<i>State ex rel. Williams v. Mauer</i> , 722 S.W.2d 296 (Mo.banc 1986) .....	17
<i>State v. Duren</i> , 547 S.W.2d 476 (Mo.banc 1977) .....	13, 15, 17, 21, 23
<i>State v. Harris</i> , 486 S.W.2d 227 (Mo. 1972) .....	17
<i>State v. Larson</i> , 79 S.W.3d 891 (Mo.banc 2002) .....	17
<i>State v. Mayes</i> , 63 S.W.2d 615 (Mo.banc 2001) .....	5
<i>State v. Whitfield</i> , 107 S.W.3d 253 (Mo.banc 2003) .....	passim
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976) .....	21

## Constitutional Provisions

U.S.Const., Amend. VI .....	16, 21
U.S.Const., Amend. VIII .....	21, 23
U.S.Const., Amend. XIV .....	16, 21

Mo.Const., Art. V, §3 .....	4
-----------------------------	---

## Statutes

§559.005, RSMo. (Supp. 1975) (repealed).....	21, 22, 23
§559.009, RSMo. (Supp. 1975) (repealed).....	21
§559.011, RSMo. (Supp. 1975) (repealed).....	22, 23
§559.016, RSMo. 1978 (repealed).....	23
§565.030.4, RSMo. 2000.....	13, 16, 19, 21, 23
§565.040.1, RSMo. 2000.....	7, 9-10, 13, 15, 17, 21, 23
§565.040.2, RSMo. 2000.....	7, 8, 16, 21

## JURISDICTIONAL STATEMENT

At the conclusion of the penalty phase of relator Bobby Joe Mayes' first degree murder trial in the underlying criminal case, the jury returned a verdict stating it was unable to agree on punishment. Before the date set for sentencing, this Court issued *State v. Whitfield*, 107 S.W.3d 253 (2003). On July 18, 2003, relying on *Whitfield*, Mr. Mayes filed a motion asking Judge Wiggins to impose a sentence of life imprisonment without probation or parole. On August 1, 2003, Judge Wiggins ordered a new penalty phase trial.

On December 1, 2003, Mr. Mayes filed in this Court a petition for writ of prohibition or, in the alternative, for writ of mandamus, and the Court issued a Preliminary Writ of Prohibition on December 23, 2003.

The Court has jurisdiction of this matter under Article V, Section 4 of the Missouri Constitution (granting authority to the Court to "issue and determine original remedial writs") and under Article V, Section 3 of the Missouri Constitution because it involves the question of whether the circuit court may order a retrial at which the state may seek the death penalty. *State ex rel. Westfall v. Mason*, 594 S.W.2d 908 (Mo.banc 1980) *rev'd on other grounds*, *Bullington v. Missouri*, 451 U.S. 430 (1981).

## STATEMENT OF FACTS

In 2001, on relator Mayes' appeal from his convictions and sentences of death on two counts of first degree murder, the Court affirmed the convictions of guilt but remanded for a new penalty phase trial. *State v. Mayes*, 63 S.W.2d 615 (Mo.banc 2001).

At Mr. Mayes' penalty phase retrial, the jury returned verdicts for each Count indicating it had found statutory aggravating circumstances (two on Count I and three on Count II) but was unable to agree on punishment (Exhibits 1, 2, and 3).<sup>1</sup> Mr. Mayes timely filed a motion for sentence of life imprisonment or, in the alternative, a new penalty phase trial, on June 16, 2003 (Exhibit 4).

The following day, June 17, 2003, the Court issued *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003). Relying on *Whitfield* and *Ring v. Arizona*, 536 U.S. 584 (2002), Mr. Mayes subsequently moved for a sentence of life imprisonment arguing, because the jury was unable to decide punishment, Judge Wiggins' only option was to impose sentences of life imprisonment without probation or parole (LWOPP) (Exhibit 5; hereinafter, "*Whitfield*" motion).

---

<sup>1</sup> Citations, unless otherwise noted, are as follows: Exhibits accompanying relator's petition: Ex-\_\_; Appendix to relator's brief: A\_\_.

On August 1, 2003, Judge Wiggins first took up Mr. Mayes' motion for directed sentence of life imprisonment or in the alternative a new penalty phase trial (Exhibit 2). Defense counsel declined to make a statement or argument addressing the motion for new trial (Exhibit 2 at 7). The state noted Judge Wiggins had reviewed all or almost all the claims in the motion for new trial at trial and "that the *Whitfield* issue does not preclude [the trial court] from determining that one of those grounds is warranted, and a new trial could be granted for those reasons" (Exhibit 2 at 8). Judge Wiggins specifically addressed one of the points – concerning his impatience with expert witnesses – stating he did not think the complaint was "valid" adding, "Now in that respect, that motion is denied" (Exhibit 2 at 8-9).

Judge Wiggins then took up Mr. Mayes' *Whitfield* motion (Exhibit 2 at 9). Defense counsel made the following arguments:

Counsel first argued under *Whitfield* "it would be improper for the court to either presume that the jury during deliberations found that the aggravating circumstance[s] warranted death and found that they outweighed any mitigating circumstances because it was not so reflected in the verdict form." *Ring* and *Whitfield* were clear: only a jury, not a judge, may make the factual findings. (Exhibit 2 at 10).

Next counsel argued *Whitfield* had rejected a new penalty phase trial

as a “remedy” because the Missouri statutes did not authorize a retrial when a jury hangs at penalty phase. Therefore, respondent could not grant a new penalty phase trial. (Exhibit 2 at 11).

Counsel’s third argument concerned §565.040: *Whitfield’s* holding – that the statutory provision “requiring the judge to make those factual determinations in the case of a deadlock was unconstitutional” – meant that a death sentence imposed by a judge when a jury deadlocked was unconstitutional. Whereas in *Whitfield*, §565.040.2 applied because Mr. Whitfield had already been sentenced, in Mr. Mayes’ case, §565.040.1 applied because Mr. Mayes had been convicted but not sentenced. (Exhibit 2 at 16-17).

Respondent stated, “we must read that statute [§565.040.1] literally.” Denying *Whitfield* had held “the death penalty to be unconstitutional,” respondent disagreed that §565.040.1 applied to Mr. Mayes’ circumstances. (Exhibit 2 at 18).

The prosecutor made the following arguments:

First, the prosecutor claimed §565.040.1 “deals with the entire death penalty scheme.” He noted the majority opinion relied on “paragraph two” [§565.040.2]. (Exhibit 2 at 19).

Next he argued the state had done everything required by the law at the time of trial: *Ring* had required only that “the jury make a written



finding of aggravating circumstances ... and we played by those rules.” The prosecutor emphasized “both sides are supposed to get a fair trial” and “we played by the rules.” (Exhibit 2 at 19-20).

Finally, the prosecutor asserted the Court in *Whitfield* found the remedy was §565.040.2 because the judge had imposed sentence. Section 565.040.2 does not apply. In Mr. Mayes’ case, he argued, because “We haven’t gotten to that point.” There “is just simply a situation where we have an instructional error to the jury” for which the remedy “is to remand it for a new trial....” (Exhibit 2 at 21-22).

Respondent questioned, “[W]hy should a party to a lawsuit be penalized if the law changes between the time the lawsuit is changed – is tried and a verdict or sentence is imposed?” (Exhibit 2 at 23). Disagreeing with *Whitfield’s* description of a retrial as “a second bite of the apple,” respondent said:

I think both sides are entitled to a fair trial. I don’t call it a bite of the apple. I call it entitled to a fair trial. I don’t think that when a case is tried and the statutes that are in force at that time are followed to the extent that instructions that are given to be followed and are error if not followed are used, and between the time of trial and before sentencing that scheme of instructions are found to be deficient, that a party benefits from that. Because all

that has happened in the interim is that the party that presented those instructions followed the law as it was in effect. Now how is the defendant prejudiced when I have not imposed a sentence under any statute? He's not.... But do think the State is entitled to a fair trial as well as the defendant? Yes. And that's why I'm going to order a new trial... .

(Exhibit 2 at 25-26).

Renewing earlier arguments, the prosecutor argued *Whitfield* did not declare “the death penalty scheme unconstitutional” and the opinion never mentioned §565.040.1. (Exhibit 2 at 27).

Defense counsel disagreeing with respondent's position: that §565.040.1 would only apply when there had been “an Eighth Amendment determination that the death penalty itself is unconstitutional.” Counsel argued §565.040.1, by its own language, applied any time, under the Missouri statutes, the death penalty was unconstitutional: “that refers to the statute and not the penalty ... that paragraph one refers to the statute.” (Exhibit 2 at 29).

Respondent and defense counsel debated the meaning of the language of §565.040.1:

THE COURT: Paragraph one is if the penalty has been found unconstitutional.

MR. COOPER [Defense Counsel]: Right. And then you said –

THE COURT: Paragraph two is if the defendant had been sentenced.

MR. COOPER: Okay. Just so that I understand the Court, it's your opinion that that sentence means that if the Supreme Court of the United States tomorrow says the death penalty is unconstitutional no matter how it's imposed, no matter what safeguards are present, or if the Missouri Supreme court said that, that is what you construe that sentence to mean. That the penalty itself –

THE COURT: As provided in that chapter. That's what the language is. The penalty as provided in that chapter.

MR. COOPER: Well, the penalty as provided in that chapter requires a judge to make factual determinations that the Court is not entitled to make. And so the death penalty as provided for in that chapter is unconstitutional, because that is a component of the death penalty. The death penalty scheme. And again, it specifically addresses another component – an aggravating circumstance.

(Exhibit 2 at 33-35).

After further discussion, respondent ordered a new penalty phase trial stating: “But I think it is not fundamentally fair to change the rules between a trial and the hearing on a motion for new trial or sentencing and not allow the party, whether it’s State or defendant, to have a chance to comply with the rules.” (Exhibit 2 at 38; A1).

On December 1, 2003, relator Mayes filed his petition for a writ of prohibition asking the Court to order respondent not to proceed with a penalty phase retrial in relator’s criminal case and a writ of mandamus ordering respondent to vacate his order granting a penalty phase retrial, remove relator’s case from the trial docket, and sentence relator to life imprisonment without the possibility of probation or parole. On December 23, 2003, the Court issued a preliminary writ of prohibition.

To avoid repetition, additional facts, as necessary, will be presented in the argument.

### POINT RELIED ON

Relator Bobby Joe Mayes is entitled to a writ of prohibition ordering respondent not to do anything other than sentence relator to life imprisonment without the possibility of probation or parole. Under *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003) and *State ex rel. Baker v. Kendrick*, 136 S.W.3d 491 (Mo.banc 2004), applicable because issued while relator's case was pending, when a jury is unable to determine punishment and the verdict returned does not indicate "the jury found all facts necessary for the imposition of death, Respondent's only option [is] to impose a sentence of life" because Missouri's statutes do not provide for the state to attempt to obtain a sentence of death for a second time by subjecting the defendant to a second penalty phase trial when the jury is unable to decide punishment. Applying *Whitfield* in the instant case neither confers a benefit on the defendant, relator Mayes, nor deprives the state of a fair trial: it simply prevents repetition of the Sixth Amendment violation that occurred in *Whitfield*. Because it would be unconstitutional for respondent to impose

the death penalty, and §565.040.1 requires imposition of a life sentence when “the ‘penalty’ [may] not be imposed for any reason” or “the ‘penalty’ is unconstitutional under the existing statutes,” respondent must sentence relator to life imprisonment without probation or parole. *State v. Duren*, 547 S.W.2d 476 (Mo.banc 1977).

*State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003);

*Ring v. Arizona*, 536 U.S. 584 (2002);

*State ex rel. Baker v. Kendrick*, 136 S.W.3d 491 (Mo.banc 2004);

*State v. Duren*, 547 S.W.2d 476 (Mo.banc 1977);

U.S.Const., Amend. VI;

U.S.Const., Amend. VIII;

U.S.Const., Amend. XIV;

Sec. 559.005, RSMo. (Supp 1975) (repealed);

Sec. 559.009, RSMo. (Supp 1975) (repealed).

Sec. 559.011, RSMo. (Supp 1975) (repealed).

Sec. §565.030.4, RSMo. 2000;

Sec. 565.040, RSMo. 2000.

## ARGUMENT

### *Point Restated*

Relator Bobby Joe Mayes is entitled to a writ of prohibition ordering respondent not to do anything other than sentence relator to life imprisonment without the possibility of probation or parole. Under *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003) and *State ex rel. Baker v. Kendrick*, 136 S.W.3d 491 (Mo.banc 2004), applicable because issued while relator's case was pending, when a jury is unable to determine punishment and the verdict returned does not indicate "the jury found all facts necessary for the imposition of death, Respondent's only option [is] to impose a sentence of life" because Missouri's statutes do not provide for the state to attempt to obtain a sentence of death for a second time by subjecting the defendant to a second penalty phase trial when the jury is unable to decide punishment. Applying *Whitfield* in the instant case neither confers a benefit on the defendant, relator Mayes, nor deprives the state of a fair trial: it simply prevents repetition of the Sixth Amendment violation that occurred in *Whitfield*.

Because it would be unconstitutional for respondent to impose the death penalty, and §565.040.1 requires imposition of a life sentence when “the ‘penalty’ [may] not be imposed for any reason” or “the ‘penalty’ is unconstitutional under the existing statutes,” respondent must sentence relator to life imprisonment without probation or parole. *State v. Duren*, 547 S.W.2d 476 (Mo.banc 1977).

### *Summary of Argument*

A writ of prohibition is appropriate and necessary to correct Judge Wiggins’ unauthorized actions exceeding his authority for which relator Bobby Joe Mayes has no adequate remedy at law. *State ex rel. Baker v. Kendrick*, 136 S.W.3d 491 (Mo.banc 2004); *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003).

*Whitfield* applies because issued while Mr. Mayes’ case was pending: after trial but before sentencing. *Baker*, 136 S.W.3d at 494. *Whitfield* and *Baker* are controlling authority and hold when the jury’s verdict shows it is unable to determine punishment, but neither the verdict nor anything in the record shows “the jury found all facts necessary” to establish the offense as eligible for death, the only sentence the trial court is authorized to impose is a sentence of life imprisonment without



possibility of probation or parole. *Baker*, 136 S.W.3d at 491, 495 *citing Whitfield*, 107 S.W.3d at 270.

Judge Wiggins was incorrect in ordering a new penalty phase trial because the Missouri statutes do not authorize a new trial when the jury deadlocks at penalty phase. Both *Baker* and *Whitfield* expressly rejected a new trial as a “remedy” when a jury is unable to determine punishment.

Judge Wiggins’ rationale – he could order a new trial because the state is entitled to a fair trial – misconstrues the holding and effect of *Whitfield* and is contrary to *Whitfield* and *Baker*. *Whitfield* neither conferred a benefit on the defendant nor deprived the state of a fair trial. *Whitfield* simply applied *Ring v. Arizona*, 536 U.S. 584 (2002) – and the Sixth and Fourteenth Amendments – to Missouri law, §565.030.4, both correcting the previous violation of Mr. Whitfield’s Sixth Amendment right to have a jury make factual findings necessary for imposition of the death penalty and providing guidance to the lower courts to prevent such violations in the future.

In *Whitfield*, because Mr. Whitfield had already been sentenced, the Court found §565.040.2 applied and “required” that he be resentenced to life imprisonment. 107 S.W.3d at 271-72. In the present case, because Mr. Mayes has been convicted but not yet sentenced,

§565.040.1 applies and requires that Mr. Mayes be resentenced to life imprisonment. *State v. Duren*, 547 S.W.2d 476 (Mo.banc 1977).

*Prohibition is a necessary and appropriate remedy for Judge Wiggins' unauthorized order granting a new penalty phase trial.*

“The extraordinary remedy of a writ of prohibition is appropriate ... to prevent the usurpation of judicial power when the trial court lacks jurisdiction” and “to remedy an excess of jurisdiction or an abuse of discretion where the lower court lacks the power to act as intended...” *State ex rel. Proctor by Bryson*, 100 S.W.3d 775, 776 (Mo.banc 2003). A writ is appropriate where the trial court has entered an unauthorized order granting a new trial. *Baker, supra*. Prohibition is appropriate to compel a trial judge to comply with the rules of this Court where there is no adequate remedy by appeal.” *State ex rel. Williams v. Mauer*, 722 S.W.2d 296, 297 (Mo.banc 1986).

A writ is appropriate here because no other remedy is available. Mr. Mayes cannot appeal Judge Wiggins' order granting a new penalty phase trial because it is not a final judgment. *State v. Harris*, 486 S.W.2d 227, 229 (Mo. 1972); *State v. Larson*, 79 S.W.3d 891, 892-93 (Mo.banc 2002) (“Appellate jurisdiction exists for civil and criminal cases only after final judgment... . In a criminal case, a final judgment

occurs only when a sentence is entered”). Mr. Mayes’ only avenue of relief from Judge Wiggins’ order of a new penalty phase trial is a writ.

Finally, a writ of prohibition is appropriate and may issue “to prevent [the] unnecessary, inconvenient and expensive litigation” that would otherwise occur as a result of Judge Wiggins’ unauthorized action ordering a new penalty phase trial. *State ex rel. Police Retirement System of St. Louis v. Mummert*, 875 S.W.2d 553, 555 (Mo. banc 1994).

*Under the controlling authority of Whitfield, Judge Wiggins’ only option was to sentence Mr. Mayes to life imprisonment without the possibility of probation or parole.*

*Whitfield* and *Baker*, both issued while Mr. Mayes’ criminal case was pending, are controlling authority. Both *Whitfield* and *Baker* hold that when the jury’s verdict shows it is unable to determine punishment, but neither the verdict nor anything in the record shows “the jury found all facts necessary” to establish the offense as eligible for death, the only sentence the trial court is authorized to impose is a sentence of life imprisonment without possibility of probation or parole. *Baker*, 136 S.W.3d at 491, 495 *citing Whitfield*, 107 S.W.3d at 270.

As in *Baker*, Mr. Mayes had been convicted but had not been sentenced when the Court issued *Whitfield*. *Baker* holds that *Whitfield*

applies to a pending case in which a defendant has not yet been sentenced. Accordingly, Judge Wiggins' only option when the jury was unable to determine punishment was to sentence Mr. Mayes to life imprisonment without possibility of probation or parole.

*Neither Missouri's statutes nor Judge Wiggins' rationale – the state's entitlement to a fair trial allowed him to order a new penalty phase trial – authorize a new trial when a jury deadlocks at the penalty phase.*

In *Whitfield*, the Court expressly addressed and rejected, based on its analysis of Missouri's statutes, the "remedy" of a new trial favored by the dissent and ordered by Judge Wiggins in the present case:

The separate opinion of Judge Price suggests ... that, at least until Missouri's jury instructions require jurors to specify at what point they have deadlocked, by making separate written findings as to each step set out in section 565.030.4, the remedy will be to order a new trial and give the State a second opportunity to convince a different jury to find the facts necessary for imposition of the death penalty. *But, Missouri's statutes do not provide for this second bite at the apple... .*

*[S]ection 565.030.4 provides that a defendant shall be sentenced to life imprisonment unless the jury finds steps 1, 2, 3,*

*and 4 against him or her....*

Therefore, had this case been tried after *Ring*, the proper course of action for the judge to follow would have been to sentence defendant to life imprisonment. The fact that the applicability of *Ring* was not determined until later does not change the remedy in the present case. It is still to enter the judgment the trial court should have entered – a sentence of life imprisonment without eligibility for probation or parole.

*Whitfield*, 107 S.W.3d at 270-71; emphasis added. *Baker* holds that *Whitfield* applies when the defendant has been convicted but not yet sentenced. *Baker*, 136 S.W.3d at 494.

In the instant case, Judge Wiggins seemed to think that, somehow, applying *Whitfield* would “penalize” the state, confer a benefit on Mr. Mayes, and deny the state a fair trial (Exhibit 2 at 23-26). But the Court’s analysis was wrong. *Whitfield* did not confer a benefit on the defendant or penalize the state or render the trial unfair to the state.

Rather, *Whitfield*, implementing the holding of *Ring*, simply corrected Missouri’s constitutionally improper practice of allowing a judge to make factual findings that *Ring* held must be made by a jury. In other words, prior to *Whitfield*, any time a jury deadlocked and a judge imposed a penalty of death sought by the state, the state enjoyed the

benefit of the violation of the Sixth Amendment allowed by §565.030.4. Applying *Whitfield* in Mr. Mayes case would not have improperly conferred a benefit on the defendant: it would merely have prevented further a violation of the Sixth Amendment.

*Section 565.040.1 requires the defendant to be sentenced to life imprisonment when the jury deadlocks at penalty phase.*

In *Whitfield*, because Mr. Whitfield had already been sentenced, the Court found §565.040.2 applied and “required” that he be resentenced to life imprisonment. 107 S.W.3d at 271-72. In the present case, defense counsel argued that because Mr. Mayes has been convicted but not yet sentenced, §565.040.1 applies and requires that Mr. Mayes be resentenced to life imprisonment (Exhibit 2 at 16-17, 29, 33-35).

*State v. Duren, supra*, is instructive on this matter. In 1976, Mr. Duren was charged with capital murder under §§559.005 and 559.009, RSMo. (Supp. 1975) (repealed). 547 S.W.2d at 477. Relying on *Woodson v. North Carolina*, 428 U.S. 280 (1976), (finding unconstitutional a North Carolina post-*Furman* statute that provided for a mandatory death penalty), the trial court found §§559.005 and 559.009 “authorized imposition of the death penalty in a manner violative of the Eighth and Fourteenth Amendments to the United States Constitution,” held the statutes unconstitutional, and granted

Mr. Duren's motion to dismiss his indictment. *Id.*

On appeal, this Court held that §559.011 – titled “Alternative punishment if death penalty declared unconstitutional” – applied to “save” the indictment and authorized Mr. Duren to be sentenced, if found guilty, to life imprisonment. *Id.* at 480-81. Section 559.011 provided, “If the category of capital murder or the penalty prescribed herein is declared to be unconstitutional by the Missouri supreme court or the United States Supreme Court, all killings which would be capital murder under any of the circumstances specified in section 559.005 shall be deemed to be murder in the first degree and the offender shall be punished accordingly...” (See A9).

Of particular interest to the present case is the Court's response to Duren's claim §559.011 did not apply since the United States Supreme Court did not find the death penalty “per se” unconstitutional:

We think the argument lacks merit. In the first place, *the legislative intent obviously was to provide for the possibility the “penalty” could not be imposed for any reason*; and secondly, this court, having now ruled that the “penalty” is unconstitutional under the existing statutes, has made the second contingency effective.

*Id.* at 480-81.

*Duren* answers Judge Wiggins' contention that §565.040.1 only applies when "the death penalty" itself is declared unconstitutional under the Eighth Amendment. *Duren* found language and intent of §559.011 broad enough to cover any circumstance in which "the 'penalty'" of death "could not be imposed for any reason." *Id.* The language of §565.040.1, the successor to §§ 559.011 and 559.016 (see A8-9) – "the death penalty provided in this chapter" makes an even stronger case for the legislative intent being to provide an alternate sentence when under the terms of Chapter 565, the death penalty may not be imposed as opposed to providing for an alternate sentence only when the death penalty is found to be unconstitutional under the Eighth Amendment.



## CONCLUSION

For the foregoing reasons, Mr. Mayes is entitled to a writ of prohibition ordering Judge Wiggins not to proceed with a new penalty phase trial and not to do anything other than sentence Mr. Mayes to life imprisonment without the possibility of probation or parole.

Respectfully submitted,

---

Deborah B. Wafer, Mo. Bar #29351  
Office of the Public Defender  
Capital Litigation Division  
1000 St. Louis Union Station  
Grand Central Building; Suite 300  
St. Louis, Missouri 63103  
(314) 340-7662; Ext. 236 – Phone  
(314) 340-7666 – Facsimile  
Attorney for Relator

CERTIFICATE OF COMPLIANCE AND SERVICE

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's 84.06(b). The brief comprises 4,552 words according to Microsoft word count.

The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses by a McAfee VirusScan program and according to that program is virus-free.

A true and correct copy of the attached brief and a floppy disk containing a copy of this brief delivered, this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, to Mr. Richard A. Starnes, Assistant Attorney General, Missouri Supreme Court Building, Washington and High Streets, Jefferson City, Missouri 65101, (573) 751-3321, and a true and correct copy was mailed, first-class postage prepaid, to respondent, the Hon. John D. Wiggins, 25th Judicial Circuit, Division 2, Phelps County Courthouse, 200 North Main, Rolla, Missouri 65401 (573) 364-1891; ext. 250.

\_\_\_\_\_  
Attorney for Relator

# APPENDIX TO RELATOR’S BRIEF

## TABLE OF CONTENTS

Respondent’s Order dated August 1, 2003 .....	A1
granting a new penalty phase trial and denying	
motion for sentence of life imprisonment without	
possibility of probation or parole	
 Section 565.030, RSMo. 2000 .....	A2-A3
 Section 565.040, RSMo. 2000 .....	A4-A7
 Section 565.016, RSMo. 1978 (repealed) .....	A8
 Section 559.011, RSMo. (Supp 1975) (repealed) .....	A9
 <i>State v. Duren</i> , 547 S.W.2d 476 (Mo.banc 1977) .....	A10-A17